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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,
v.

SIERRA CLUB, ET AL.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,
v.

SIERRA CLUB, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF AMICUS CURIAE OF JOHN D. DINGELL
(U.S. REP., 16th DIST. MICHIGAN)

JOHN D. DINGELL
Member of this Court's Bar

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No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
v. *Petitioners,*

SIERRA CLUB, ET AL.,
Respondents.

No. 75-581

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
v. *Petitioners,*

SIERRA CLUB, ET AL.,
Respondents.

**MOTION OF JOHN D. DINGELL FOR LEAVE
TO FILE BRIEF AMICUS**

Movant, John D. Dingell, respectfully moves this Court for leave to file the annexed Brief *amicus curiae*. He has filed with the Clerk of this Court: (a) the letter of Respondent's counsel consenting to the filing of this Brief; and (b) the letter of Petitioner's counsel, Solicitor General Bork, refusing to consent to the filing of this Brief.

The reasons for this motion are:

Movant, now and since December 1955 a Member of the U.S. House of Representatives from the 16th Congres-

sional District of Michigan, has been intimately involved in the development, enactment and legislative oversight of the principal statute involved in this case, the National Environmental Policy Act of 1969 (NEPA). Movant authored the bill, chaired the Subcommittee of the House Merchant Marine and Fisheries Committee which held hearings on the bill, and acted as Floor Manager for the bill when the House passed it. He was a member of the House-Senate Conference Committee which produced the present text of NEPA, and Floor Manager of the Conference Report in the House. Subsequently, he chaired the House Subcommittee which held numerous oversight hearings and investigations concerning the administration of NEPA. As the present Chairman of the Energy and Power Subcommittee of the House Interstate and Foreign Commerce Committee, he has closely observed the relationship between NEPA and the nation's energy needs.

This case involves issues concerning the scope and application intended by Congress with respect to NEPA and its required environmental impact statements (EIS), particularly as concerns the development of coal production on Federal lands to meet the nation's energy needs.

Movant believes his brief contains information which would assist this Court in this case, and which is not adequately explicated in the briefs of the parties or of the other *amici* in this case.¹

¹ It is significant, and ironic, that the Solicitor General, while refusing consent to the filing of movant's brief *amicus*, has granted consent to the filing of *amici* briefs by at least the following: Carter Oil Company; American Public Power Association, et al.; Utah Power and Light Company; Pacific Legal Foundation; Western Fuels Association, Inc., et al.

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BRIEF OF JOHN D. DINGELL
UNITED STATES REPRESENTATIVE FROM MICHIGAN
AS AMICUS CURIAE

This brief supports the position of Respondents that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., mandates preparation of an environmental impact statement covering energy resource development in the Northern Great Plains.

DESCRIPTION AND INTEREST OF THE AMICUS CURIAE

John D. Dingell, now and since December 1955, a Member of the U.S. House of Representatives from the 16th Congressional District of Michigan, has been intimately involved in the development, enactment and legislative oversight of the principal statute involved in this case, the National Environmental Policy Act of 1969 (NEPA). He authored the bill, chaired the Subcommittee of the House Merchant Marine and Fisheries Committee which held hearings on the bill, and acted as Floor Manager for the bill when the House passed it. He was a member of the House-Senate Conference Committee which produced the present text of NEPA, and Floor Manager of the Conference Report in the House. Subsequently, he chaired the House Subcommittee which held numerous oversight hearings and investigations concerning the administration of NEPA. As the present Chairman of the Energy and Power Subcommittee of the House Interstate and Foreign Commerce Committee, he has closely observed the relationship between NEPA and the nation's energy needs.

ARGUMENT

- I. The Congress enacted the National Environmental Policy Act of 1969 to establish a national environmental policy and implementing law which would redirect Federal policies, programs, and activities.

The National Environmental Policy Act was the product of Congressional concern about the Nation's ubiquitous environmental problems. The scope of the problems and the degree of Congressional concern with these problems are clearly noted in the House Report on H.R. 12549, the House counterpart to S. 1075:

" 'By land, sea, and air, the enemies of man's survival relentlessly press their attack. The most dangerous of all these enemies is man's own un-directed technology. The radioactive poisons from nuclear tests, the runoff into rivers of nitrogen fertilizers, the smog from automobiles, the pesticides in the food chains, and the destruction of topsoil by strip mining are examples of the failure to foresee and control the untoward consequences of modern technology.'

"Thus spoke the New York Times in an editorial on May 3 of this year. The editorial, which endorsed the type of legislation embodied in H.R. 12549, may understate the complexity and urgency of the challenge. The problem is deep, and it touches on practically every aspect of everyday life: economic, scientific, technological, legal, and even interpersonal. It is a problem to which Presidents have addressed themselves with increasing concern in recent years, and it is a problem which we can no longer afford to treat as of secondary importance." [H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969)]

The report of the Senate Interior and Insular Affairs Committee, on the bill (S. 1075), stated the same view:

"As a result of this failure to formulate a comprehensive national policy, environmental decisionmak-

ing largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small, but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.

"Today, it is clear that we cannot continue on this course. Our natural resources—our air, water, and land—are not unlimited. We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are clear." [S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).]

Similar views were expressed in the Senate during the debate on the Conference Report [H.R. Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969)] on S. 1075. Senator Jackson, the Floor Manager, stated:

"... This measure is important because it provides for new approaches to dealing with environmental problems on a *prevention* and *anticipatory* basis. As Members of the Senate are aware, too much of our past history of dealing with environmental problems has been focused on efforts to deal with 'crises' and 'reclaim' our resources from past abuses... We see increasing evidence of (environmental mismanagement) all around us;" (emphasis added) [115 Cong. Rec. 40147 (1969)]

Thus, both Houses enunciated similar misgivings about the manner in which the Federal Government was managing our environmental resources and the need for fundamental, institutional reform and comprehensive environmental planning. Their comments were directed not toward single Federal projects or incidental Federal

actions, but rather toward the broader impacts of Federal action on the overall environment.

The bold and innovative declaration of national policy, as stated by the Congress in section 101 of the National Environmental Policy Act, leaves little doubt that a massive and sustained effort would be required to redirect the Nation's environmental priorities. In this "Declaration of National Environmental Policy," the Congressional statement of findings, upon which the law's requirements are based, contains reference after reference to the need for remedying abuses of the past and the necessity for continuing these efforts in the future.

"The Congress, recogniz[es] the profound impact of man's activity on the . . . natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances . . ." [Sec. 101(a).]

The Congress:

"... recogniz[ed] further the critical importance or *restoring and maintaining* environmental quality... [and] declare[d] that it is the *continuing policy* of the Federal Government . . . to use all practicable means and measures . . . to *create and maintain* conditions under which man and nature can exist in productive harmony, and fulfill the . . . requirements of *present and future* generations of Americans." [Sec. 101(a).] (Emphasis added.)

It was on account of this perceived Federal environmental morass that the new direction was mandated by NEPA. It is evident that the Congress felt strongly about the need for Federal agencies to reexamine their policies, programs and activities when it enumerated their duties in section 102(2):

"102(2) . . . all agencies of the Federal Government shall—

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in *planning* and in *decision-making* which may have an impact on man's environment;

(B) Identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in *decisionmaking* along with economic and technical considerations;

(D) Study, develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(G) Initiate and utilize ecological information in the planning and development of resource-oriented projects." (Emphasis added.)

Not only were the Federal agencies directed to adopt new environmental responsibilities as enumerated by Congress, but further the agencies were explicitly required in section 103 of the Act to reassess their missions and report to Congress their own recommendations for improvement:

"All agencies of the Federal Government shall review their statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971 such measures as may be necessary to bring their authority and policies into conformity

with the intent, purposes, and procedures set forth in this Act."

Professor Lynton K. Caldwell, of Indiana University, who assisted the Senate Committee on Interior and Insular Affairs in the drafting of the National Environmental Policy Act, stated in a December 1975 workshop paper on the implementation of NEPA that section 103, although it had been neglected by the agencies, nonetheless contained continuing authority for agencies to correct their environment-affecting missions. Caldwell states that:

" . . . Unfortunately, because the agencies were required by law to report to the President by July 1, 1971 (the actual date was qualified by Administrative action) this section has been assumed to have a one-time applicability. As might have been expected, few agencies found anything in their statutory authority, regulations, or policies that they would propose to change. As a corrective, section 103 appeared to be ineffectual, but it could embarrass agency attempts to avoid compliance with NEPA on grounds of conflicting mandates." [House Comm. on Merchant Marine and Fisheries, Workshop on the National Environmental Policy Act, Serial No. 94-E, 94th Cong., 2nd Sess. (1976).]

In its first oversight report on NEPA, the House Merchant Marine and Fisheries Committee expressed its concern that the initial reviews under section 103 were not satisfactory, but that efforts to implement the provisions should be carried further:

" . . . Exactly how these reviews were to be handled internally was left to the individual agencies. *This lack of specific guidance, however, should not have been construed as relaxing the Congressional mandate . . .*

"The problems recognized above demonstrated to the Committee the need for more thorough agency review efforts under section 103 . . .

In the Committee's view, section 103 offers an excellent mechanism for the creation of . . . agency evaluation units *to assess problems and policies on a long-term basis*. The Committee also believes that the *continuation of the review process initiated under section 103* offers the prospect of improved intra-agency communication on environment-affecting actions. (Emphasis added.) [House Comm. on Merchant Marine and Fisheries, Administration of the National Environmental Policy Act (P.L. 91-190), H.R. Rep. No. 92-316, 92nd Cong., 1st Sess. 37-38 (1971).]

Most importantly, however, NEPA declares a national policy which directs Federal agencies—

“ . . . to use all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources.” [Section 101(a), 42 U.S.C. 4331 (a)]

The principal tool to implement this policy is the environmental impact statement (EIS) which is required prior to any “major Federal action which significantly affects the quality of the human environment”.

The action-forcing requirement of the environmental impact statement was to ensure the comprehensive consideration of environmental impacts early in the planning and decision-making process in order to avoid and minimize their adverse results. Had the Congress anticipated that this requirement would apply only to project level actions and not to the more comprehensive activities of a Federal agency, then there would have been little purpose in providing such an empty requirement. Clearly, it was not intended to be a *post facto* rationalization for our continued neglect of the environment.

II. Congress intended the environmental impact statement to effectuate changes in the planning and decision-making process early in the formulation of Federal proposals.

Congress adopted the environmental impact statement requirement “to assure that all Federal agencies plan and work towards meeting the challenge of a better environment.” [Senate Rep. No. 91-296, 91st Cong., 1st Sess. (July 9, 1969)]. The timing of the EIS preparation is vital to attain NEPA's goals as expressed in section 101. Thus, in requiring Federal agencies to consider environmental factors in reaching a decision to undertake an action, NEPA seeks to affect the mode by which a decision is rendered as well as its end-product.

The language of section 102(2)(C) requires that an environmental impact statement be *included* in every recommendation or report on proposals for major Federal actions and that the statement, with comments, accompany a proposal through the agency review process.

Because Congress recognized that the Federal agencies vary enormously in their procedures and actions, Congress did not define the term “proposal” or prescribe the specific time at which the EIS should be prepared. Instead, Congress enacted NEPA with the clear purpose that the EIS process be used *during* the planning and decision-making, at a sufficiently early stage to affect such planning and decision-making. The clearest statement as to when the EIS must be prepared is in *Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 418 F 2d 1079, 1094 (D.C. Cir. 1973):

“Statements must be written late enough in the process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decisionmaking process.”

Congress clearly intended that all provisions of NEPA be interpreted so as to effectuate to the greatest extent possible the policies established by the Act.* The impact statement process was not intended to be a mere overlay on decisions already made.

The requirement of early EIS preparation is one of the essential elements of the NEPA process. If decision-makers are expected to seriously consider the environmental impacts of their actions in a timely fashion, their early planning and decisions, as well as their ultimate decisions, must be made in full view of the available facts.

The most critical finding made during the Congressional oversight hearings on the implementation and administration of NEPA, chaired by Congressman Dingell in 1970 and 1972, was the importance of applying a "systematic interdisciplinary approach" to agency planning and decisionmaking, coupled with full public disclosure of relevant facts in the *early* decisionmaking process. In fact, the impact statement process itself was found to be as important as the ultimate EIS manuscript. [Hearings on Administration of the National Environmental Policy Act before Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, H.R. Rep. No. 91-41, 91st Cong., 2nd Sess. (1970) and H.R. Rep. No. 92-24, 92nd Cong., 2nd Sess. (1972)].

The petitioners contend that no EIS is required in this case because, they say, the Federal agencies have

* NEPA specifically requires that Federal laws, regulations, and policies be administered in accordance with its policies. (Section 102(1)).

The Conference Report on S. 1075 unequivocally states that Federal agencies must comply with the policies set forth in NEPA "to the fullest extent possible" and that this language shall not be used as a means of avoiding compliance with NEPA's directives. H.R. Rep. No. 91-765 on S. 1075, 91st Cong., 1st Sess. (1969).

not yet made a "report or recommendation" on any "proposal". Such argument is essentially a play on words. If those words mean—as the petitioners seem to argue—a formal report on a program which the agency denominates as its proposal for the action it has decided upon, and that the EIS need not be prepared until the agency's report or recommendations are ready, then the purpose of NEPA's EIS will have been substantially subverted. It would result in deferring the agency's EIS to a fatally late point in its decisionmaking process.

The intent of NEPA and its application should not be circumvented by the Federal petitioner's fragmented, disjointed approach to the development to the Northern Great Plains Region. A comprehensive, systematic approach to the development of national programs has not been a characteristic of the normal Federal decisionmaking and implementation process. Quite to the contrary, the myriad of Federal policies and programs have frequently worked at odds with one another. This very fact was a compelling reason for the Congress to enact a law that cut across all functional lines of our Federal system. [Senate Comm. on Interior and Insular Affairs, Hearings on S. 1075, 91st Cong., 1st Sess. at 116 (1969)]. For the petitioners to argue that NEPA should not be applied absent a Federally sanctioned formal "proposal" would be to defeat the very reason for which this statute was enacted and signed into law.

As NEPA was first implemented, an important question facing the agencies was whether several Federal actions, which may by themselves be minor in consequence but taken together would significantly affect the environment, would constitute a major Federal action for which the agency must prepare an EIS. This question was resolved by the Council on Environmental Quality, the agency established to oversee the administration of the EIS requirement. Its guidelines state that

the statutory words "major Federal action" must be read "with a view to the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated." 40 C.F.R. 1500.6(a) (1974). The Guidelines explained that minor Federal actions can be cumulatively considerable:

"... when one or more agencies over a period of years puts into a project individually minor but collectively major resources," or when ... one decision involving a limited amount of money is a precedent for action in much larger cases,"

or when one decision

"... represents a decision in principle about future courses of action, or when several Government agencies individually made decisions about partial aspects of a major action." [40 C.F.R. 1500.6(a)].

Viewed in another way, the phrase "major Federal action" connotes both a certain magnitude of activity and a certain nexus between that activity and the United States Government. The term "action" is not limited merely to a single deed, but can include a pattern or series of acts that seem to the perceiver to be part of a single undertaking. An analogy might be drawn to a series of words within a sentence: although they have individual meaning, when taken together they convey a more complex thought that goes beyond the meaning of the individual words. Clearly, a series of acts need not be completed before an "action" is recognized. Moreover, an "action" can be said to exist when a series of activities reaches that stage of coherence and maturity which suggests that a decision to go forward is being made and has a reasonable possibility of being implemented. The required level of coherence and maturity would be reached when a certain intensity of focus and level of momentum can be identified.

In the case at bar, the Federal petitioners have created such focus and momentum in the numerous ac-

tions already taken related to coal development in the Northern Great Plains region.

In 1970, the Interior Department initiated its North Central Power Study. It also began a study of potential water resources in Montana and Wyoming in relation to coal development, and broadened this study in 1972 in its Northern Great Plains Resources Program concerning the social, economic and environmental aspects of coal development in that region, and issued a report thereon in August 1975. The Interior Department has in numerous instances issued coal leases, approved mining plans, granted rights of way for coal development. It is now considering applications for additional leases, mining plans and rights of way. Similar action has been and is being taken by the Corps of Engineers and the Forest Service. These studies and actions certainly provide the focus of anticipated action. Moreover, the momentum created by these allegedly unrelated actions is undeniable, and is tacitly acknowledged in this case.

In sum, Congress intended NEPA to require Federal agencies to examine, through the mechanism of an environmental impact statement, the effect of its actions on the environment. If a particular set of actions, such as those described in the present case, affect an entire region of the country, then the EIS must examine the resultant impacts and the alternatives to these actions as they affect the region.

The NEPA requirement is not satisfied by a plethora of EIS's which are restricted to local impacts, or by a generalized study concerning the nation-wide impact of a coal expansion program.

Moreover, if the application of NEPA is delayed, as Petitioners urge, until the Federal agencies make a formal proposal or something labeled a "report or recommendation" regarding a program action as important

as the development of energy resources in the Northern Great Plains, before an EIS is required, it would be undoubtedly difficult, if not impossible, to reconsider or revise the myriad of policies and decisions which support that recommendation. It is imperative that the determination whether a "proposal" exists, sufficient to require an EIS, not be dependent upon the agency's own characterization. In many cases, a formal report or recommendation on a proposal may never be forthcoming or necessary.

The final EIS must, of course, be included in any recommendation or report on proposals for major Federal action. But clearly, an EIS must be prepared early enough in the agency planning and decision-making process to assure that the "action-forcing" analysis required in 102(2)(C) is integrated with the development of a proposal.

Congress certainly did not intend that the broad language of Section 102 of NEPA be read so restrictively as to allow agency deferral of environmental analysis and statement preparation until after the agency has finalized formal proposals for action. Such an interpretation would defeat a basic purpose of NEPA by rendering the environmental impact statement nothing more than a *post facto* justification for decisions already made.

III. The development of our Nation's energy resources mandate NEPA's comprehensive, systematic, and interdisciplinary approach at several levels.

A regional programmatic EIS is appropriate in order to examine the proper scope and intensity of environmental impacts. It is especially necessary when several projects are interrelated as part of larger plans, even though each project is itself an end product which may also be the subject of an environmental analysis and report.

A multi-tiered impact statement process is desirable, if not obligatory, where several levels of impact analysis are required. It is clearly possible that even a national programmatic study, coupled with a myriad of highly detailed local analyses, might overlook or ignore the synergistic or cumulative adverse effect of these actions on the region. Just as we might have difficulty judging the size of our hand when looking through a telescope or a microscope, the selection of an inappropriate level of environmental impact analysis may unintentionally eliminate or misrepresent the true facts of some predicament.

The case now before this Court aptly demonstrates the need for comprehensive NEPA evaluation. NEPA compliance in the Northern Great Plains situation would assure the Federal Government, the Congress, and the public an opportunity to view and participate in development of a comprehensive, coherent energy development policy for the region.

Certainly, in view of the numerous interrelated Federal actions with respect to energy development in the Northern Great Plains Region, both ongoing and anticipated, it cannot be seriously argued that a regional impact statement is inappropriate in scope.

Federal actions related to Northern Great Plains energy development are not limited merely to approval of individual coal leases. The Government is also involved in issuance of rights-of-way, water option contracts and numerous permit approvals, as well as general planning for regional management of resources development. The statutes upon which these Federal actions are based, such as the Mineral Leasing Act of 1920, are to be "interpreted and administered" in accordance with NEPA's directives to the "fullest extent possible." Section 102(1). The requirement that the Federal management of energy resources in the Northern Great Plains

Region be subjected to *comprehensive* policy-level environmental analysis is completely consistent with the specific statutory authorities upon which Federal actions in the region are based. Far from being inconsistent with other statutes, the NEPA analysis required here would have the precise complementary effect on existing regional planning and decisionmaking that the Congress intended. It would assure that the numerous decisions made in the region are made on the basis of an environmental overview of the impacts and available alternatives.

Although energy development is an important and serious problem which must be dealt with on many fronts, the Congress has not made an exception to NEPA for such problems. Indeed, there is no better example of a national issue which necessitates the comprehensive, systematic, and interdisciplinary approach required by NEPA.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

JOHN D. DINGELL
Member of this Court's Bar

April, 1976.